IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE THOTTATHIL B.RADHAKRISHNAN

THURSDAY, THE 24TH MAY 2007 / 3RD JYAISHTA 1929

OP.No. 23427 of 1998(L)

PETITIONER:

P.M.BALACHANDRAN, PREVENTIVE OFFICER,
EXCISE CONTROL ROOM P.O.,
ERANHIPALAM, KOZHIKODE.

BY ADV. SRI.V.RAJENDRAN
SMT.VRINDA RAJENDRAN

RESPONDENTS:
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1. **STATE OF KERALA, REP.BY THE**
CHIEF SECRETARY, GOVERNMENT OF KERALA,
THIRUVANANTHAPURAM.

2. **JOINT COMMISSIONER,**
COMMISSIONERATE OF EXCISE,
THIRUVANANTHAPURAM.

3. **ASSISTANT EXCISE COMMISSIONER, KOZHIKODE.**

4. **T.BALAKRISHNAN, EXCISE INSPECTOR,**
C/O.ASSISTANT EXCISE COMMISSIONER, KOZHIKODE.

5. **K.MADHAVAN ADIYODI, EXCISE INSPECTOR,**
C/O. ASSISTANT COMMISSIONER, KOZHIKODE.

6. **K.VEERAN KUTTY, EXCISE COMMISSIONER,**
C/O. ASSISTANT COMMISSIONER, KOZHIKODE.

BY GOVERNMENT PLEADER SMT.T.B.RAMANI
SRI.C.VATHSALAN

THIS ORIGINAL PETITION HAVING BEEN FINALLY HEARD ON 24 /05 / 2007 , THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

OP. NO.23427/1998

ORDER ON CMP. NO.41223/1998 IN OP. NO;23427/1998.

DISMISSED

24.05.2007 **SD/- THOTTATHIL B.RADHAKRISHNAN, JUDGE**

APPENDIX

PETITIONER'S EXHIBITS

EXT.P1:- COPY OF THE LETTER DT.2.11.97 OF THE BOARD OF REVENUE NO.XE5-21909/77/L.DIS.

EXT.P2:- COPY OF THE LETTER DT.14.5.79 OF THE 3RD RESPONDENT NO.D3.9796/78/L.DIS.

EXT.P3:- COPY OF THE REPRESENTATION DT.17.9.79 OF THE PETITIONER.

EXT.P4:- COPY OF THE LETTER DT.8.11.79 OF THE BOARD OF REVENUE NO.XE8443/79

EXT.P5:- COPY OF THE GOVERNMENT LETTER DT.28.1.85 NO.23437/F1/81/TD.

EXT.P6:- COPY OF THE JUDGMENT DT. 24.9.91 IN OP. NO.9226/87.

EXT.P7:- COPY OF THE LETTER DT.27.12.91 OF THE SEC., BAORD OF REVENUE.

EXT.P8:- COPY OF THE JUDGMENT DT.9.2.98 IN C.C.C. NO.444/97.

EXT.P9:- COPY OF THE PROCEEDINGS DT.20.9.95 OF THE 3RD RESPONDENT.

/TRUE COPY/

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THOTTATHIL B. RADHAKRISHNAN, J.

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O.P.No.23427 OF 1998-L

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Dated this the 24th day of May, 2007.

JUDGMENT

The petitioner and respondents 4 to 6 were members of the Excise and Prohibition Subordinate Service in the feeder category for appointment by promotion to the category of Excise Preventive Officers. The said Subordinate Service came to be governed by the Special Rules framed for that subordinate service which came into effect on 24-9-1974 by the publication of those Rules in the Gazette. As on that date, none among the private respondents nor the writ petitioner had the test qualification prescribed by the Special Rules for being considered for promotion as Excise Preventive Officers, going by the contents of Ext.P9 final seniority list. However, I may notice that it is the uncontroverted averment of the writ petitioner that he had possessed that qualification from 1972

and not from 25-9-1979 as evidenced by Ext.P9, but that may be inconsequential in so far as this lis is concerned.

2. The private respondents, who are admittedly seniors to the petitioner in the feeder category but did not possess the test qualifications, were assigned different dates as holding the post of Preventive Officer. Though all those dates are after the coming into force of the Special Rules, their such holding of the post was, obviously, without being test qualified. So much so, they could have been treated as Preventive Officers only by giving them promotion on provisional basis on the strength of Note 2 to Rule 6(2) of the Special Rules which provide that provisional promotion as Preventive Officers is permissible during the period between the date of commencement of the Special Rules and the introduction of the test and during a further period of two years. While the rule-making authority made such a legislative device, the intention is quite obvious and this is that, while avoiding a stagnation of unqualified hands in the feeder category solely on account of want of test qualification, the larger interest of public service could be well

served by promoting them provisionally and extending to them a period of two years to acquire the test qualification. The net effect of Note 2 to Rule 6(2) is that all such promotions will remain provisional and that promotion is with the pre-supposition that the incumbent will acquire the test qualification within a period of two years. The obvious legislative intent is that he will not have any entitlement to continue as a Preventive Officer on a regular basis without being test qualified. If such a person continues to remain without test qualification after the expiry of the two year term provided by Note 2 to Rule 6(2), he becomes an unqualified hand holding a superior post provisionally following the promotion made on the strength of Note 2. The necessary corollary of this situation is that when a test qualified junior is available, the provisional promotion of the senior, who is not test qualified, should come to an end resulting in his being put back to his original position (even if one were to call it reversion, though not so strictly in service jurisprudence), thereby creating the room for the most-eligible person to occupy the higher post in public service. So much so, when

the private respondents had spent their respective term of two years as Preventive Officers without obtaining the test qualification, the petitioner became entitled in law to be promoted as against the senior-most among the private respondents by displacing him. If that be so, the 5th respondent ought to have been displaced at least at the end of June, 1981 when the period of two years would expire after the test was conducted. This means that the petitioner had a legitimate statutory and constitutional right to be considered for promotion and be promoted as against the unqualified senior because the petitioner was test qualified and there was no ground on which he could have been sieved out of being promoted.

3. With the passage of time, the private respondents, clinging on illegally as noticed above, were given further promotions while the petitioner was promoted as Preventive Officer only on 1-7-1992 resulting in his retiring from service as a Preventive Officer while he could have legitimately and reasonably expected to hold such post to which the private

respondents were further promoted. As of now, the fact remains that the petitioner and the private respondents have superannuated from service.

4. In the aforesaid circumstances, molding the relief in the writ petition filed in the year 1998, in 2007, it needs to be declared that the petitioner was entitled to be promoted as Preventive Officer at least with effect from the first day of July, 1981 and was entitled to all such promotions which could have been given to him as against the promotions given to his senior-most unqualified senior in terms of test qualification. Such modification in the seniority list will necessarily bring in the entitlement of the petitioner for higher emoluments and other reliefs being considered. Since the petitioner has already retired from service and he having not discharged the duties and responsibilities attached to the higher cadres, ends of justice would be satisfied, if the monetary benefits accruing out of the aforesaid are made available only in the form of retiral benefits and not by granting any arrears of any higher emoluments which would have been otherwise due.

In the result, this writ petition is allowed in the following terms:

i. It is declared that the petitioner was entitled to be promoted as Preventive Officer in the Kerala Excise and Prohibition Subordinate Service with effect from 1st July, 1981. He shall be so promoted and his seniority position in the category of Preventive Officers in Kozhikode Division shall be so re-fixed.

ii. Following the aforesaid, his due promotion dates to the category of Preventive Officers and above shall also be worked out by assigning to him, the respective dates on which the senior-most unqualified senior was promoted and ultimately, the due pay and allowances which he would have drawn as on the date of retirement shall be fixed by giving effect to the aforesaid

declarations and directions.

iii. In the aforesaid terms, his last pay certificate shall be re-issued and his retiral benefits shall be re-fixed.

iv. It is ordered that the petitioner will not be entitled to any monetary benefit towards arrears of pay and allowances on such fixation.

v. The directions contained in this judgment and all actions following the declarations as aforesaid shall be carried out by the competent officers in the Government within an outer limit of three months from the date of receipt of a copy of this judgment.

No costs.

THOTTATHIL B. RADHAKRISHNAN, JUDGE.

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THOTTATHIL B. RADHAKRISHNAN, J.

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JUDGMENT

Dated: 24th May, 2007.